BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department.	DOCKET NO. 090539-GU ORDER NO. PSC-11-0228-PCO-GU ISSUED: May 20, 2011

ORDER ON FLORIDA CITY GAS COMPANY'S MOTION TO DISQUALIFY MIAMI-DADE WATER AND SEWER DEPARTMENT'S COUNSEL AND WITNESS BRIAN P. ARMSTRONG OR, IN THE ALTERNATIVE, TO STRIKE HIS TESTIMONY

Background

Florida City Gas Company (FCG) is an investor-owned natural gas utility company subject to the Commission's regulatory jurisdiction as prescribed in Chapter 366, Florida Statutes (F.S.). Miami-Dade County is a political subdivision of the State of Florida, and Miami-Dade Water and Sewer Department (MDWASD) is a department of the County. FCG, formerly City Gas Company of Florida, executed a Natural Gas Transportation Services Agreement with MDWASD in 1998. FCG and MDWASD negotiated a successor agreement to the 1998 Agreement, dated August 28, 2008 (2008 Agreement).

On December 14, 2009, MDWASD filed a petition for approval of the 2008 Agreement that initiated the instant docket, and FCG was granted intervention by Order No. PSC-10-0261-PCO-GU, issued on April 26, 2010. The Commission determined that it has jurisdiction to consider the 2008 Agreement by Order No. PSC-10-0671-PCO-GU, issued on November 5, 2010, and the matter was scheduled for a formal administrative hearing on June 1-3, 2011. The issues for hearing were established by Order No. PSC-10-0730-PCO-GU, issued on December 13, 2010, and are reflected in Prehearing Order No. PSC-11-0219-PHO-GU, issued on May 12, 2011.

The parties filed direct and rebuttal testimony on December 29, 2010, and January 28, 2011, respectively. This prefiled testimony included the direct and rebuttal testimony of MDWASD witness Brian P. Armstrong (Mr. Armstrong). On March 18, 2011, FCG filed a Motion to Disqualify Mr. Armstrong as MDWASD's counsel and witness and to exclude his testimony or, in the alternative, to strike portions of his testimony (Motion to Disqualify or Motion). MDWASD filed a Response in Opposition to FCG's Motion to Disqualify on March 28, 2011 (Response in Opposition). The parties presented oral arguments on the Motion to Disqualify at the Prehearing Conference on May 5, 2011.

Motion to Disqualify

FCG asserts that a hearing officer in an administrative proceeding has the same power that a court exercises to disqualify a lawyer from representing a party if that representation

would be in violation of law or the Rules of Professional Conduct applicable to lawyers.[1] FCG contends that Mr. Armstrong acted as MDWASD's legal representative in this proceeding and filed testimony as a witness for MDWASD in violation of Rules 4-3.7(a) and 4-3.4(e) of the Rules Regulating the Florida Bar.[2] Accordingly, FCG requests that the Commission disqualify Mr. Armstrong from representing MDWASD because his dual role as both attorney and witness in this proceeding is impermissible and prejudicial to FCG.

FCG contends that pursuant to Rule 4-3.7(a), a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client," subject to certain exceptions not applicable here. According to FCG, the Florida Supreme Court stated in Scott v. State[3] that Rule 4-3.7(a) was designed to "prevent the evils that arise when a lawyer dons the hat of both an advocate and a witness for his or her own client." FCG also relies on Alliedsignal Recovery Trust v. Alliedsignal, Inc.,[4] in which the Second District Court of Appeal noted that such a dual role "can prejudice the opposing party by bolstering the lawyer's testimony for his client because it comes from an advocate." FCG notes that the comments to Rule 4-3.7(a) state that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party," because

> The trier of fact may be confused or misled by a lawyer serving as both advocate and witness . . . A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

FCG claims that Mr. Armstrong's attempt to wear two hats in the same proceeding – one as MDWASD's attorney, the other as MDWASD's witness – is prohibited by Rule 4-3.7(a) because of the prejudice and confusion it creates. Therefore, FCG contends that Mr. Armstrong should be disqualified as MDWASD's lawyer in this proceeding.

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[1] See Lee v. Florida Department of Insurance and Treasurer, 586 So. 2d 1185, 1188 n.3 (Fla. 1st DCA 1991); Professional Practices Council v. Green, Div. of Admin. Hearings Case No. 79-2275, 1980 WL 14909; and Order No. PSC-10-0222-PCO-WS, issued April 7, 2010, in Docket No. 090478-WS, Application for original certificates for proposed water and wastewater systems, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC [hereinafter "Order No. PSC-10-0222-PCO-WS"] at 3.

[2] FCG alleges that: (1) Mr. Armstrong appeared as "special counsel" for MDWASD and argued on MDWASD's behalf at the October 26, 2010 Commission Conference in which the Commission considered its jurisdiction over the 2008 Agreement; (2) Mr. Armstrong communicated with FCG's counsel as MDWASD's attorney and represented MDWASD as "my client" as early as June 2009; (3) Mr. Armstrong appeared as counsel for MDWASD at informal meetings between Commission staff and the parties on March 3, 2010 and March 11, 2011; (4) Mr. Armstrong advocated on behalf of MDWASD at the December 8, 2010 Status Conference in which the prehearing officer determined the issues for hearing in this docket; (5) Mr. Armstrong's law firm filed pleadings on MDWASD's behalf on March 16, 2011; (6) documents and information produced in discovery have confirmed that MDWASD was using Mr. Armstrong as an attorney to provide legal counsel and representation; and (7) Mr. Armstrong filed direct testimony on December 29, 2010, and rebuttal testimony on January 28, 2011, as a witness in this proceeding.

[3] 717 So. 2d 908, 910 (Fla. 1998).

[4] 934 So. 2d 675, 678 (Fla. 2d DCA 2006).

FCG further requests that Mr. Armstrong be disqualified as a witness for MDWASD because his role as both lawyer and witness violates Rule 4-3.4(e). This rule states that a lawyer shall not:

> (e) in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused. . .

FCG contends that Florida courts applying Rule 4-3.4(e) have held that it is improper for an attorney to offer his personal opinions in order to bolster the credibility of his client's own witnesses.[5] FCG argues that if such opinions are improper by lawyers during trial, they cannot become proper "by dressing up the lawyer as a witness." FCG asserts that this testimony should be excluded because it is comprised of Mr. Armstrong's inflammatory accusations against FCG and his bolstering, personal opinions on the testimony, the case, and the credibility of witnesses, all of which are prohibited by Rule 4-3.4(e).

FCG states that the Commission should exclude Mr. Armstrong's testimony because it is also improper under Sections 90.604 and 90.701, F.S. According to FCG, it is unclear from Mr. Armstrong's testimony whether MDWASD is offering him as an expert witness or a fact witness. However, FCG concludes that since MDWASD did not identify him as an expert and there are no legal, policy or other issues requiring expert testimony in this case, he must be a fact witness. FCG contends that to the extent Mr. Armstrong is testifying as a fact witness, the Commission should strike his testimony because he was not a witness to the events leading up to the petition for approval of the 2008 Agreement and, therefore, cannot testify on the basis of personal knowledge as required by Section 90.604, F.S.[6] FCG asserts that Mr. Armstrong also testifies in the form of an opinion, and pursuant to Section 90.701, F.S., a non-expert witness is only permitted to offer opinion testimony based upon "what he or she perceived" if such opinion testimony will not mislead the trier of fact to the prejudice of the objecting party and the opinion does not require a special knowledge, skill, experience or training.[7] FCG contends that Mr. Armstrong's opinion testimony is improper because he cannot testify to perceptions he did not have.

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[5] See Servis v. State, 855 So. 2d 1190, 1194-95 (Fla. 5th DCA 2003); Muhammad v. Toys "R" Us, Inc., 668 So. 2d 254, 258 (Fla. 1st DCA 1996); and Pippin v. Latoskynski, 622 So. 2d 566, 569 (Fla. 1st DCA 1993).

[6] Section 90.604, F.S., "Lack of personal knowledge," provides, in relevant part: "Except as otherwise provided in s. 90.702, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter." The exception provided in Section 90.702, F.S., allows an expert witness to testify in the form of an opinion if certain conditions are met.

[7] Section 90.701, F.S., states that a lay (i.e. non-expert) witness's testimony about what he perceived may be in the form of inference or opinion when (1) the witness cannot readily communicate what he perceived without using inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party, and (2) the opinions and inferences do not require a special knowledge, skill, experience, or training.

If the Commission does not disqualify Mr. Armstrong as MDWASD's attorney and witness, FCG requests in the alternative that the Commission strike certain portions of his prefiled testimony. FCG states that a party may move to strike "redundant, immaterial, impertinent, or scandalous matter" from any pleading at any time pursuant to Rule 1.140(f), Florida Rules of Civil Procedure (Fla. R. Civ. P.), and "irrelevant, immaterial, or unduly repetitious evidence shall be excluded" pursuant to Section 120.569(2)(g), F.S. FCG states that the Commission has also stricken testimony that is beyond the scope of permissible testimony.[8] FCG asserts that the Commission should strike certain portions of Mr. Armstrong's testimony that are redundant, irrelevant, immaterial, scandalous, dominated by legal argument or outside the scope of the issues in this case because such testimony is improper, lacks probative value, and does not assist the Commission in making a decision in this matter.[9]

Response in Opposition

MDWASD responds that the Commission should deny FCG's request to disqualify Mr. Armstrong as a lawyer. MDWASD does not dispute FCG's factual allegations regarding Mr. Armstrong's involvement in this docket. However, MDWASD maintains that with the exception of his advocacy as special counsel at the October 26, 2010 Commission Conference, Mr. Armstrong has merely acted as a sub-consultant to MDWASD's consultant, Langer Energy Consulting, Inc. MDWASD asserts that Mr. Armstrong is not its lawyer because he has never filed a notice of appearance and thus is not served pleadings or discovery. Finally, MDWASD represents that Mr. Armstrong will not appear as MDWASD's counsel at the hearing scheduled for June 1-3, 2011. MDWASD contends that the rules upon which FCG relies, namely Rules 4-3.7(a) and 4-3.4(e) of the Rules Regulating the Florida Bar, prohibit a lawyer from testifying as a witness and advocating as a lawyer "at a trial" or "in trial," respectively. According to MDWASD, these rules and the corresponding cases cited by FCG do not apply here because Mr. Armstrong has not acted as counsel for MDWASD, much less its trial counsel as specified in the rules. Furthermore, MDWASD states that even if Rules 4-3.7(a) and 4-3.4(e) applied, it is unlikely the Commission would be confused or misled by Mr. Armstrong's testimony because, unlike a jury of lay people, the Commission is composed of experienced professionals with advanced educational backgrounds.

MDWASD states that FCG's request to exclude Mr. Armstrong as a witness or, in the alternative, strike portions of his testimony should also be denied because his testimony does not violate Chapter 90, F.S., Section 120.569(2)(g), F.S., or Rule 1.140(f), Fla. R. Civ. P.

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[8] See Order No. PSC-06-0261-PCO-TP, issued March 28, 2006, in Docket No. 050119-TP, In re: Joint petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC ["Joint Petitioners"] objecting to and requesting suspension and cancellation of proposed transit traffic service tariff filed by BellSouth Telecommunications, Inc., and Docket No. 050125-TP, In re: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc., by AT&T Communications of the Southern States, LLC [hereinafter "Order No. PSC-06-0261-PCO-TP"].

[9] The specific portions of Mr. Armstrong's testimony that FCG seeks to exclude are pages 2-14; pages 16-25; page 26, lines 24-25; and pages 27-31 of his Direct Testimony, and page 2, line 2 through page 4, line 5; page 6, lines 10-16; and pages 8-9 of his Rebuttal Testimony.

MDWASD asserts that Mr. Armstrong presented testimony as an expert witness, not a fact witness as assumed by FCG; accordingly, his opinion testimony is proper under Section 90.702, F.S. MDWASD also contends that his testimony does not violate Section 120.569(2)(g), F.S., or Rule 1.140(f), Fla. R. Civ. P., because it is relevant and within the scope of the issues to be decided in this case. MDWASD states that Mr. Armstrong provided testimony as an expert in utility management, practices and regulation, on matters such as Commission jurisdiction, treatment of utility expenses, incremental costs, and the competitive rate adjustment mechanism. MDWASD maintains that expert testimony from a utility manager and attorney with Mr. Armstrong's regulatory experience and background will assist the Commission in determining whether to approve the 2008 Agreement. Accordingly, MDWASD asserts that the Commission should not exclude him as a witness or strike any of his testimony.

Analysis and Ruling

Upon review of the parties' arguments, Mr. Armstrong shall not be disqualified as MDWASD's lawyer or witness in this proceeding, but certain portions of his testimony shall be stricken as improper. Although an administrative hearing officer can disqualify a lawyer from representing a party to a proceeding if that representation would be in violation of law or the Rules of Professional Conduct applicable to lawyers,[10] disqualification of an attorney is an extraordinary remedy that should be used only sparingly.[11] Furthermore, while I believe that Mr. Armstrong has, for all practical purposes, acted as MDWASD's lawyer, I do not believe that his representation violates the Rules Regulating the Florida Bar, provided he does not appear as trial counsel on behalf of MDWASD at the hearing in this docket. While I decline to disqualify Mr. Armstrong as MDWASD's lawyer and witness, those portions of his testimony that improperly provide legal argument shall be excluded.

Disqualification of Mr. Armstrong as Attorney

MDWASD's contention that Mr. Armstrong has not acted as its attorney is unconvincing. The undisputed facts reveal that Mr. Armstrong has filed pleadings for MDWASD, represented himself as legal counsel for MDWASD on numerous occasions, and even argued before the Commission on MDWASD's behalf twice in this very docket. MDWASD's reliance on Mr. Armstrong's failure to file a notice of appearance in the docket is not persuasive because it exalts form over function. For the purpose of disposing of FCG's Motion to Disqualify, it appears that Mr. Armstrong is MDWASD's lawyer.

Nevertheless, the Rules Regulating the Florida bar cited by FCG are inapplicable here because they govern a lawyer's conduct at a trial in which that lawyer is actively advocating on behalf of his client. Rule 4-3.7(a) provides that a lawyer cannot act as an advocate "at a trial" in

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[10] See Lee, 586 So. 2d at 1188 n.3; Professional Practices Council v. Green, Div. of Admin. Hearings Case No. 79-2275, 1980 WL 14909; and Order No. PSC-10-0222-PCO-WS, supra note 1, at 3.

[11] Fleitman v. McPherson, 691 So. 2d 37, 38 (Fla. 1st DCA 1997); Swensen's Ice Cream Co. v. Voto, Inc., 652 So. 2d 961 (Fla. 4th DCA 1995); and Alliedsignal Recovery Trust, 934 So. 2d at 677-79 (cautioning that disqualification should be resorted to only sparingly because it denies the right to choose one's counsel and works a material injury that cannot be remedied on appeal).

which the lawyer is likely to be a necessary witness, subject to certain exceptions. Similarly, Rule 4-3.4(e) provides that a lawyer cannot, while "in trial," comment on the credibility of witnesses, allude to irrelevant or inadmissible matters, assert personal knowledge,[12] or state personal opinions as to the justness of the cause or the culpability of a party. Florida courts have narrowly interpreted the phrases "at a trial" and "in trial." For example, in Columbo v. Puig,[13] the Third District Court of Appeal held that a lawyer "may act as an advocate at pre-trial (before the start of trial) and post-trial (after the judgment is rendered) proceedings," without running afoul of the Rules of Professional Conduct. Likewise, the court in Eccles v. Nelson[14] found "no departure from the essential requirements of law" where the trial court disqualified an attorney from representing his client at trial but refused to disqualify him from representing the client before and after trial. In light of MDWASD's representation that Mr. Armstrong will not appear as its trial counsel at the administrative hearing in this case, disqualification of Mr. Armstrong would be improper.

In addition, the harm that Rules 4-3.7(a) and 4-3.4(e) are intended to prevent is not implicated here. The rules seek to avoid harm to the opposing party that may be caused when the trier of fact observes the client's lawyer switching between the roles of lawyer and witness in the same proceeding. The fear is that the trier of fact may give unfair weight to a lawyer's testimony for his client merely because the testimony comes from a lawyer, or the trier of fact may be confused or misled because it is unclear whether the advocate-witness's testimony should be taken as proof or as an analysis of the proof. [15] The risk of prejudice to the opposing party is reduced, if not eliminated, when the lawyer, in this case Mr. Armstrong, will appear as a witness, and only a witness, for his client at trial. Accordingly, FCG's request to disqualify Mr. Armstrong as MDWASD's lawyer is hereby denied.

Disqualification of Mr. Armstrong as Witness

Section 120.569(2)(g), F.S., which provides the evidentiary standard for admissibility in administrative hearings, states:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in

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[12] Pursuant to Rule 4-3.4(e), a lawyer can assert personal knowledge while testifying as a witness under the exceptions identified in Rule 4-3.7(a).

[13] 745 So. 2d 1106, 1107 (Fla. 3d DCA 1999). See also Graves v. Lapi, 834 So. 2d 359, 360 (Fla. 4th DCA 2003)(finding that order disqualifying an attorney was "too broad" because it did not limit the disqualification to "trial advocacy"); Fleitman, 691 So. 2d at 38 (holding that a lawyer may represent his client "up until the trial" and "after the trial," but should be disqualified from representing his client at the trial itself where it appears his testimony will be offered); Cerillo v. Highley, 797 So. 2d 1288, 1289 (Fla. 4th DCA 2001)(finding that an attorney cannot "try the case" if he will be a witness at the trial, but he should not be prohibited from participating in pre-trial proceedings); and ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 89-1529 (1989)(stating that a lawyer who anticipates testifying as a witness at a trial may represent a party in discovery and other pretrial proceedings, because the prohibition in Rule 4-3.7(a) applies specifically to service "as an advocate at trial").

[14] 919 So. 2d 658, 660 (Fla. 5th DCA 2006).

[15] See Scott, 717 So. 2d at 910 n.9; Alliedsignal Recovery Trust, 934 So. 2d at 678; and Comments to Rules 4-3.7(a) and 4-3.4(e) of the Rules Regulating the Florida Bar.

> the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in the courts of Florida.

Accordingly, the evidence code in Chapter 90, F.S., is not controlling in administrative proceedings, but it is informative for the resolution of FCG's Motion. FCG argues that Mr. Armstrong's testimony should be excluded in its entirety pursuant to Chapter 90, F.S., because Mr. Armstrong testifies without personal knowledge and offers improper opinion testimony in contravention of Sections 90.604 and 90.701, F.S., respectively. However, these arguments are based on FCG's assumption that Mr. Armstrong is testifying as a fact witness, not an expert.[16]

MDWASD has confirmed in its Response that Mr. Armstrong is presenting testimony as an expert witness in matters of utility regulation.[17] To the extent Mr. Armstrong is offering testimony as an expert, there is no basis for excluding his testimony under Chapter 90, F.S. Although Section 90.604, F.S., requires a witness to have personal knowledge, it carves out an exception for expert witnesses, who need not testify on the basis of personal knowledge. In addition, Section 90.701, F.S., which governs opinion testimony of lay witnesses, is likewise inapplicable. Pursuant to Section 90.702, F.S., an expert may testify in the form of an opinion if his specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue. FCG has not shown that Mr. Armstrong's opinion testimony fails to meet this requirement. Accordingly, FCG's request to exclude his testimony *in toto* as improper under Sections 90.604, 90.701, and 120.569(2)(g), F.S., is denied.

Exclusion of Portions of Mr. Armstrong's Testimony

Pursuant to Rule 28-106.211, F.A.C., "[t]he presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case," and presiding officers have significant discretion in ruling on motions to strike testimony.[18] In addition, Rule 1.140(f), Fla. R. Civ. P., provides that a court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time. While the Florida Rules of Civil Procedure, like Chapter 90, F.S., do not control in administrative proceedings, the Commission has followed the

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[16] Motion to Disqualify at 4.

[17] I note that FCG preserved its right to object at hearing to Mr. Armstrong's qualifications as expert. See Prehearing Order No. PSC-11-0219-PCO-GU, issued May 12, 2011, in Docket No. 090539-GU at 18. Therefore, FCG can renew its objection to these portions of the testimony if it is determined at hearing that Mr. Armstrong does not qualify as an expert witness.

[18] See Town of Palm Beach v. Palm Beach County, 460 So. 2d 879, 882 (Fla. 1984); Order No. PSC-06-0261-PCO-TP, supra note 8, at 3; Order No. 02-0876-PCO-TP, issued June 28, 2002, in Docket No. 020129-TP, In re: Joint petition of US LEC of Florida, Inc., Time Warner Telecom of Florida, L.P., and ITC^DeltaCom Communications objecting to and requesting suspension of proposed CCS7 Access Arrangement tariff filed by BellSouth Telecommunications, Inc.; and Order No. PSC-99-0099-PCO-TP, issued January 20, 1999, in Docket No. 981008-TP, Request for arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc. regarding reciprocal compensation for traffic terminated to internet service providers [hereinafter "Order No. PSC-99-0099-PCO-TP"](noting that the Commission has the discretion to allow testimony and simply give it the weight it is due, but nevertheless striking certain portions of the expert witness's testimony that contained legal analysis and opinion).

requirements of Rule 1.140(f), Fla. R. Civ. P., in considering motions to strike.[19] I decline to exclude all of the portions of Mr. Armstrong's testimony identified by FCG because I do not believe they are impertinent, repetitive, immaterial, or scandalous under Rule 1.140(f), Fla. R. Civ. P. However, I do believe that the testimony in which Mr. Armstrong offers legal argument is improper; therefore, it shall be excluded.

The Commission has generally prohibited the admittance of expert testimony on legal issues.[20] Section 120.57, F.S., provides for a fact-finding evidentiary proceeding and does not contemplate cross-examination of a witness on legal opinion.[21] In addition, Florida case law clearly states that an expert witness should not be allowed to testify concerning questions of law, which are properly reserved for the trier of fact.[22] For these reasons, the following portions of Mr. Armstrong's testimony shall be stricken as improper legal opinion and argument:

Direct Testimony
Page 4, line 15 through page 7, line 2
Page 13, lines 12-21
Page 23, lines 3-9
Page 30, line 7 through page 32, line 5

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[19] See, e.g., Order No. PSC-99-1809-PCO-WS, issued September 20, 1999, in Docket No. 971220-WS, Application for transfer of Certificates Nos. 592-W and 509-S from Cypress Lakes Associates, Ltd. to Cypress Lakes Utilities, Inc. in Polk County; Order No. PSC-02-0878-FOF-TP, issued July 1, 2002, in Docket No. 001305-TP, Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.; and Order No. PSC-93-0165-FOF-EI, issued February 2, 1993, in Docket No. 920324-EI, Application for a rate increase by TAMPA ELECTRIC COMPANY.

[20] See Order No. PSC-94-1363A-PCO-WS, issued November 21, 1994, in Docket No. 930945-WS, Investigation into Florida Public Service Commission jurisdiction over SOUTHERN STATES UTILITIES, INC. in Florida [hereinafter "Order No. PSC-94-1363A-PCO-WS"](striking legal argument in testimony even though one of the issues specifically identified to be addressed at hearing presented a purely legal question); Order No. PSC-94-0371-PCO-WS, issued March 30, 1994, in Docket No. 930880, Investigation into the appropriate rate structure for SOUTHERN STATES UTILITIES, INC. for all regulated systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties [hereinafter "Order No. PSC-94-0371-PCO-WS"]; Order No. PSC-94-1520-PCO-WS, issued December 9, 1994, in Docket No. 930945-WS, Investigation into Florida Public Service Commission jurisdiction over SOUTHERN STATES UTILITIES, INC. in Florida [hereinafter "Order No. PSC-94-1520-PCO-WS"]; and Order No. PSC-99-0099-PCO-TP, supra note 18.

[21] Order No. PSC-94-0371-PCO-WS, supra note 20, at 6-7.

[22] C. Ehrhardt, Florida Evidence, §703.1 (2010 Edition); Town of Palm Beach, 460 So. 2d at 882 (holding that a witness's testimony is inadmissible if it tells the trier of fact how to decide the case without helping in the determination of what has occurred); T.J.R. Holding Co., Inc. v. Alachua County, 617 So. 2d 798, 800 (Fla. 1st DCA 1993)("The interpretation of a statute is a question of law to be determined solely by the court, not by expert witnesses."); Williams v. State Dept. of Transportation, 579 So. 2d 226, 231 (Fla. 1st DCA 1991)(holding that an expert should not be allowed to testify concerning questions of law, which are to be determined by the trier of fact); Seibert v. Bayport Beach and Tennis Club Ass'n, 573 So. 2d 889, 891-92 (Fla. 2d DCA 1990)(holding that an expert witness should not be allowed to testify concerning questions of law); Lindsay v. Allstate Insurance Company, 561 So. 2d 427, 428 (Fla. 3d DCA 1990)(upholding court's exclusion of expert testimony as to how a statute should be interpreted because it is improper for a court to rely on expert testimony to determine the meaning of terms in a legislative enactment).

Rebuttal Testimony
Page 2, line 2 through page 4, line 5
Page 8, line 12 through page 9, line 19

In these excerpts, Mr. Armstrong provides legal argument that is not appropriately raised in testimony. For example, he discusses the Commission's jurisdiction to consider the 2008 Agreement and legislative intent, suggests cross-examination questions he would ask of other witnesses, gives his opinion on how certain statutes should be interpreted and how legal standards, rules and Commission precedent should be applied to the facts of this case, and even poses what FCG refers to as a "hypothetical motion in limine," in which he argues why the Commission should find certain evidence inadmissible at hearing. The appropriate place for this type of legal discussion is not in testimony but rather in a post-hearing filing, such as a brief, where all of the parties have an equal opportunity to present case law and argument in support of their positions.[23] Accordingly, to the extent such matters are relevant to the issues to be decided in this proceeding, they should be argued by MDWASD's counsel in its post-hearing brief. FCG's request to strike portions of Mr. Armstrong's testimony is thus granted, in part, as set forth herein.

Based on the foregoing, it is

ORDERED by Chairman Art Graham, as Prehearing Officer, that Florida City Gas Company's request to disqualify Miami-Dade Water and Sewer Department's lawyer and witness Brian P. Armstrong is denied. It is further

ORDERED that portions of the Direct Testimony and Rebuttal Testimony of Miami-Dade Water and Sewer Department's witness Brian P. Armstrong are stricken as set forth in the body of this Order.

[23] See Order No. PSC-94-1520-PCO-WS, supra note 20, at 3 (striking legal argument in expert testimony because "legal argument . . . should not be precluded, but rather reserved for the post hearing briefs") and Order No. PSC-94-1363A-PCO-WS, supra note 20, at 2-3 (striking legal argument testimony because legal argument "is more appropriately reserved for argument of counsel in a party's brief").

By ORDER of Chairman Art Graham, as Prehearing Officer, this 20th day of May, 2011.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.